FILED
JAN 17 1994
OFFICE OF THE CLERK

No. 93-1031

(2)

In The

Supreme Court of the United States

October Term, 1993

ROSCOE COON AND ARNAUD GIRARD D'ALBISSIN,

Petitioners,

vs.

SHUTTS & BOWEN,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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STATEMENT OF ISSUES PRESENTED

Whether the Court should entertain a petition for certiorari filed by a *pro se* party without an interest in the outcome, where the legal issue raised does not represent a true conflict among the circuits, but simply a finding by the Eleventh Circuit that under the particular facts and circumstances of the case, there was no evidence of any bad faith, however defined, sufficient to support the imposition of monetary sanctions under 28 U.S.C. § 1927.

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STATEMENT OF JURISDICTION

There is no decisional conflict and no special and important reason for the exercise of the Court's jurisdiction. Petitioner, Arnaud Girard d'Albissin, an individual proceeding *pro se*, lacks standing to petition for certiorari in that he has no interest in the outcome of the petition, and cannot represent the interest of any other party. Roscoe Coon, doing business as Marine Diesel Repair, has not joined in the petition either personally or through counsel, and may not now join, pursuant to Rule 12.2, Supreme Court Rules.

STATEMENT OF THE CASE

Petitioner, Arnaud Girard d'Albissin, is the owner of the vessel COCO LOCO. He bought the boat after a fire on board the COCO LOCO had damaged another boat belonging to the plaintiff below, William Cosselmon.

William Cosselmon, represented by the law firm of Shutts & Bowen, commenced an action *in rem* for the damages to his vessel by arresting the COCO LOCO on February 4, 1991. Roscoe Coon, doing business as Marine Diesel Service, was appointed substitute custodian at a fee of $100 per day. He is not a proper party to the petition herein.

In late February, 1991, d'Albissin filed, *inter alia*, a motion to increase security, which was opposed by plaintiff because of insufficient proof of the value of d'Albissin's claimed interest. Cosselmon died in an automobile accident in South America on April 28, 1991. D'Albissin

did not introduce evidence of the value of his interest in the COCO LOCO until June 4, 1991. On July 1, 1991, his motion to increase security was deferred, requiring him to provide additional information. On July 9, 1991, upon being advised that its client's successor did not wish to continue the litigation, Shutts & Bowen moved for a voluntary dismissal, seeking return of the COCO LOCO to d'Albissin.

On July 17, 1991, the substitute custodian, Roscoe Coon, through counsel, moved for payment of custodial fees. On August 23, 1991 the district court entered a final order of dismissal, ordering the plaintiff to pay the accrued custodial fees, and, if plaintiff did not pay within seven days, ordering plaintiff's counsel, Shutts & Bowen, to make the payment. The order also provided that the COCO LOCO be returned to d'Albissin immediately upon payment of the fees.

On October 30, 1991, the district court issued an order of clarification, again imposing payment of the custodial fees, this time as a sanction against plaintiff's counsel, Shutts & Bowen, under 28 U.S.C. § 1927, for not having dismissed the action on the date of plaintiff's death. The COCO LOCO was returned to d'Albissin "free and clear of any encumbrances." Petitioner d'Albissin was thus not liable for payment of the custodial fees, and had no further interest in the proceedings.

Shutts & Bowen appealed the district court's imposition of the custodial fees, and the Eleventh Circuit, *per curiam*, vacated the district court's judgment, finding that the lower court had abused its discretion in the absence of any evidence that Shutts & Bowen unreasonably and

vexatiously delayed filing of the motion for dismissal or unreasonably and vexatiously multiplied the proceedings.

SUMMARY OF ARGUMENT

Petitioner has no interest in the issue raised, and therefore lacks standing, since he is not liable for payment of the custodial fees in any event. Only the custodian, Roscoe Coon, is affected by the appellate court's reversal of the fee award, and he has not timely pursued the issue in this Court, and cannot be represented by petitioner *pro se*.

There is no real conflict in the circuits' interpretation of "unreasonable and vexatious" under § 1927. The Eleventh Circuit's holding that sanctions may not be imposed under the facts of this case is in accord with other United States courts of appeal and should not be disturbed.

ARGUMENT

This is a case in which not even the petitioner has any interest in the outcome, and no substantial or important issue is raised. Certiorari should therefore be denied. The district court made an award of custodial fees against the deceased plaintiff's counsel, for not having sought dismissal of the action immediately upon plaintiff's death. Petitioner d'Albissin was not the recipient of the award, and was not liable for payment of the custodial fees upon reversal of the award.

Although the substitute custodian's name appears on the cover of petitioner's brief, the petition for certiorari was filed only by d'Albissin, *pro se*. Roscoe Coon did not file any separate petition within 90 days from entry of the order of the Eleventh Circuit sought to be reviewed, as required by Rule 13.1. Respondent subsequently received a certificate of service dated December 17, 1993, and apparently signed by Roscoe Coon. Even if such a paper were to be considered a joinder in d'Albissin's petition, it is untimely under Rule 12.2.

Petitioner invokes the Court's jurisdiction under Rule 10.1(a) by contending that the decision of the Eleventh Circuit Court of Appeals in this case conflicts with the decisions of other United States courts of appeal on the same matter. This is a false conflict. The holding of the Eleventh Circuit was based on its finding that the facts and circumstances of this particular case did not support the district court's imposition of the custodial fees as a sanction against the law firm under 28 U.S.C. § 1927. Therefore, "in the absence of bad faith intent to delay" the action, the district court abused its discretion, and the award was reversed.

This holding does not apply an improper standard of bad faith, as petitioner contends, but simply finds no evidence of bad faith, whether subjective or objective. The Eleventh Circuit standard is entirely in accord with the standard applicable in other United States courts of appeal, and requires more than the simple delay in dismissal found here. There must be an intent to delay or a willful disregard for proper conduct. *Avirgan v. Hull*, 932 F.2d 1572, 1582 (11th Cir. 1991), *cert. denied*, ___ U.S. ___,

112 S. Ct. 913 (1992) (excess costs assessed against attorneys "who willfully abuse judicial process by conduct tantamount to bad faith").

The challenged ruling is very much like the holding of the Ninth Circuit Court of Appeals in *MGIC Indemnity Corp. v. Moore*, 952 F.2d 1120 (9th Cir. 1991), in which the appellate court reversed the district court's imposition of § 1927 sanctions as an abuse of discretion. The sanctions had been imposed for the law firm's failure to drop the action as to one of the defendants prior to trial, but the district court made no explicit finding of bad faith. Seeing "no evidence of bad faith upon which the district court could have rationally based its decision," the Ninth Circuit reversed and stated the proper standard:

> Section 1927 . . . provides sanctions for unreasonably and vexatiously multiplying proceedings and requires a finding of bad faith. . . . We assess an attorney's bad faith under a subjective standard. Knowing or reckless conduct meets this standard.

962 F.2d at 1122. This is the same standard that was applied here.

In the Tenth Circuit a similar standard is set out in *Braley v. Campbell*, 832 F.2d 1504, 1512 (10th Cir. 1987) (§ 1927 sanction imposed "for conduct which manifests intentional or reckless disregard of the attorney's duties to the court"). The Sixth and Seventh Circuits are also in accord with the Eleventh Circuit standard. *In re TCI Ltd.*, 769 F.2d 441, 445 (7th Cir. 1985) (sanctions for "a lawyer's reckless indifference to the law"); *Kiefel v. Las Vegas Hacienda, Inc.*, 404 F.2d 1163, 1167 (7th Cir. 1968), *cert. denied*,

395 U.S. 908 (1969) (sanctions only for "serious and studied disregard for the orderly processes of justice."); *United States v. Ross*, 535 F.2d 346, 349 (6th Cir. 1976) ("intentional departure from proper conduct, or, at a minimum, a reckless disregard of the duty owed by counsel to the court"). The Third Circuit also requires "actions taken which are tantamount to willful bad faith" for imposition of § 1927 sanctions. *Baker Industries v. Cerberus Ltd.*, 764 F.2d 204, 209 (3rd Cir. 1985).

The 1980 amendment of § 1927 did not affect the applicable standard, but merely specified that any sanction imposed may include costs, expenses and attorneys fees. Revision Notes, § 1927. This Court found in *Chambers v. NASCO, Inc.*, ___ U.S.___, 111 S. Ct. 2123, 2134 (1991), that the court's inherent power to assess fees for bad faith misconduct was not affected by the amendment of § 1927. There is no need for this Court to again take up this issue.

In the present case the district court imposed sanctions under § 1927 only because "Shutts & Bowen failed to take any action to abate these inevitable [custodial] costs" after plaintiff's untimely death. October 30, 1991 order. While finding no subjective bad faith or any conscious impropriety, the district court likewise failed to find any reckless disregard for the law or of counsel's duties to the court, and thus no objective bad faith either. Where the acts complained of do not support the district court's imposition of sanctions, the Eleventh Circuit properly found that the district court had abused its discretion and reversed. In doing so the appellate court acted in accord with the standards used by other United

States courts of appeal and of this Court. There is therefore no reason for this Court to exercise its jurisdiction in this matter.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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